IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3835 OF 2005

John Maneul Felsha D'Souza. ... Applicant.
Versus.
The State of Maharashtra. ... Respondent.

Shri Savaji D.Nangre for the Applicant.

Shri K.V.Saste, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 12th July, 2005.

P.C.:

1. The learned Counsel appearing for the Applicant and the learned A.P.P. were heard on the last date.

2. Office registered against the Applicant is under section 366 and section 376 of the Indian Penal Code. The allegation of the prosecutrix is that the Applicant represented to her that he was owner of fairly a large property and that he will marry with the prosecutrix. The allegation of the prosecutrix is that from April 2004 to August 2004 time and again the Applicant had sexual intercourse with the prosecutrix. As a result the prosecutrix conceived and on 7th December 2004 a baby girl was born. The F.I.R. is filed by the prosecutrix on 11th December 2004 i.e. five days after she gave birth to a child. There are statements of the other witnesses recorded, who have supported the version of the prosecutrix.

3. The learned Advocate for the Applicant submitted that apart from the fact that there is gross delay in filing the F.I.R. There is a report submitted by the Assistant Chemical Analyser of the Government Forensic Science Laboratory, Mumbai. The report is based on the DNA extracted from the blood samples of the prosecutrix, the child and the Applicant. The opinion recorded in the said report is that the Applicant is excluded to be the biological father of the child. He submitted that the report is sufficient to create a serious doubt about the version of the prosecutrix. The learned Counsel for the Applicant placed reliance on a decision of the learned Single Judge of this Court reported in 2004 All M.R.(Cri.) page 1 (Sayed Malloomiyah Sayed v/s. State of Maharashtra).

4. The learned A.P.P. for the State submitted that at the time of filing of F.I.R. the age of the prosecutrix was less than 16 years and therefore, consent was irrelevant as offence relates to the period between April 2004 to August 2004. He submitted that opinion in DNA Test is as good as the opinion of any other expert and truthfulness of the said opinion will have to be tested in trial of the case. He placed reliance on a decision of the Apex Court reported in AIR 2001 Supreme Court page 2226 (Smt.Kamti Devi and anr. v/s. Poshi Ram).

5. I have considered the submission. In normal course the statement of the prosecutrix who is stated to be 16 years old would have been sufficient at this stage to indicate complicity of the Applicant. It is to be noted here that according to the prosecutrix the offence was committed from April 2004 to August 2004 and as a result the prosecutrix gave birth to a child. As pointed out earlier F.I.R. is filed five days after the birth of the child.

6. It will be necessary to refer to the decision of the Supreme Court in the case of Smt.Kamti Devi (supra).

The Apex Court held thus:

> "11. .....The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent

> and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

It is pertinent to note that the Apex Court has observed that the result of genuine DNA test is said to be scientifically accurate. All that the Apex Court said is that the report is not enough to escape from the conclusiveness of section 112 of the Evidence Act. Section 112 of the Evidence Act creates conclusive presumption of legitimacy in respect of a birth during the substance of the marriage. The Apex Court held that in case where section 112 of the Apex Court is applicable, the presumption is conclusive which cannot be defeated by result of genuine DNA test which is said to be scientifically accurate. Therefore, the ratio of the decision of the Apex Court would not apply to the case of the Applicant. It cannot be ignored that even the Apex Court has noted that the result of the genuine DNA test is scientifically accurate.

7. DNA test in the present case is conducted by the Assistant Chemical Analyser to the Government Forensic Science Laboratory, Mumbai. If one goes by the result of the DNA test then the entire version of the

prosecutrix becomes doubtful. The report of the DNA test cannot be ignored altogether at this stage as report is by the Chemical Analyser from the Government Laboratory. The Applicant has been arrested on 11th December 2004. Thus the Applicant is in custody for last more than 7 months. The charge sheet is admittedly filed. Apart from the delay in filing the F.I.R., the result of the DNA test entitles the Applicant to the relief of bail. However, while on bail the Applicant will have to be subjected to restrictions to ensure that the witnesses and protected.

8. Hence the following order is passed:

(i) The Applicant shall be enlarged on bail in connection with C.R.No.577 of 2004 Vakola Police Station, subject to furnishing a personal bond of Rs.15,000/- with one or two sureties of like amount.

(ii) The bail is granted subject to the condition that the Applicant will not enter the area falling the jurisdiction of the Vakola Police Station, Mumbai, till conclusion of trial.

(iii) The Bail is granted subject to condition

that the Applicant shall not, directly or indirectly, make any inducement or threat to any prosecution witnesses and shall not in any manner tamper with prosecution evidence.

(iv) The Applicant shall cooperate with the learned Trial Judge for expeditious disposal of the trial. Any attempt by the Applicant to delay the trial may be a ground for cancellation of bail.

(v) Any observation made in this order shall not be construed as any finding or any expression of opinion on the merits of the case at the time of trial.

(vi) Application is disposed of in above terms.

(vii) The parties to act upon an authenticated copy of this order.

Judge.